90-1955

No.

Supreme Court, U.S.
FILED
JUN 24 1991
OFFICE OF THE CLERK

THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

ANDRES PABON, Petitioner

v.

STATE OF FLORIDA.

ON WRIT OF CERTIORARI TO THE
THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the appellate court fundamentally erred in denying petitioner's appeal, where the prosecution at trial, in closing argument, asked the jury to "Just imagine someone walking up **to you** and you don't know anybody in the crowd and they are going (to) say **I want you** to tell me about your last sexual experience", (e.s.), violating the 'Golden Rule', and, in addition, by further comment in closing which improperly evoked the sympathy of the jury for the victim in the case, a child: "Your responsibility is not small but **your verdict can vindicate what an 11 year old child has experienced to date**" (e.s.).

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ANDRES PABON, Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE U. S. SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Andre Pabon, Petitioner, prays a writ of certiorari issue to review the decision of affirmance, without opinion, issued by the Fourth District Court of Appeal, State of Florida, April 3, 1991.

JURISDICTION

The decision of affirmance was entered April 3, 1991; no rehearing was sought. No opinion was issued with the intermediate appellate court's decision; under Florida law, no discretionary appeal to the state supreme court is allowed. Jenkins v State, 385 So.2d 1356 (Fla. 1980). Petitioner has no further remedy in Florida. The jurisdiction of the Supreme Court is invoked under 28 USCS Sec. 1257.

STATEMENT OF THE CASE

Petitioner was tried before a jury and found guilty on a single charge of sexual battery upon a child. The conviction was appealed to the district court, which per curiam affirmed.

REASONS FOR GRANTING WRIT

The trial court and the court of appeal below erred in not reversing the conviction on grounds that certain fundamentally improper comments were made by the prosecution to the jury in closing argument. Essentially, the prosecution asked the jury to put themselves in the shoes of the victim, an 11 year old, regarding talking to strangers about sex, in the context of the emotionally charged child molestation case. The prosecution also asked the jury to "vindicate" the victim. These errors were further compounded by the trial court's overruling of defense objections implying approval of the proposition that sympathy play a part in their consideration.

As a result, there is a reasonable possibility that the improper comments were construed by the jury to mean that sympathy was an appropriate factor to consider. As such, the error cannot be considered

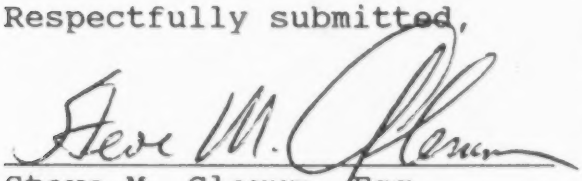
harmless. Because the comments may well have played a substantial part in the jury's deliberations, such a possibility on the issue presented is not a reweighing of evidence, for the reason that we cannot possibly know how the jury fact-finder weighed the forbidden comments in deliberations, and is thus a proper issue to be addressed by this Court.

The comments constitute fundamental error, which was not properly acted upon by the courts below, and which deprived petitioner of his fundamental right to a fair trial.

CONCLUSION

For the forgoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

ANDRES PABON,

Appellant,

v. CASE NO. 90-2316.

STATE OF FLORIDA,

Appellee.

Decision filed April 3, 1991

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Robert B. Carney, Judge.

Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

LETTS, GUNTHER and GARRETT, JJ., concur.